

THE THEORY OF SYARI'AH ORIENTED PUBLIC POLICY

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Abstrak. Teori Kebijakan Publik Berorientasi Syariah. Teori *siyāsah syar'īyyah* yang berorientasi pada kebijakan publik syariah mencerminkan kebijakan pemerintahan Islam. Islam, yang mencakup semua aspek kehidupan manusia, mulai ibadah hingga muamalah, dari *siyāsah* (pemerintahan yang baik) hingga *'alaqāt al-dawliyyah* (hubungan internasional), memiliki sistem pemerintahan tertentu dan kebijakan. Untuk itu, artikel ini mencoba menganalisis teori tersebut, mulai dari definisi, latar belakang, jenis-jenis, dan tujuannya.

Kata kunci: kebijakan publik syariah, *siyāsah syar'ī'ah*, *maqāshid al-syarī'ah*, hukum Islam

Abstract. The Theory of Syari'ah Oriented Public Policy. *Siyāsah syar'īyyah* theory oriented in public policies that reflect sharia Islamic government policy. Islam, which covers all aspects of human life, from worship to *mu'āmalāt*, from *siyāsah* (good governance) to *'alaqāt al-dawliyyah* (international relations), has a particular system of government and policy. Therefore, this article analyses the theory, starting from the definition, background, types, and its purpose.

Keywords: *syarī'ah*-oriented public policy, *siyāsah syarī'ah*, *maqāshid al-syarī'ah*, islamic law

Introduction

The great Muslim scholar, Ibn Taymiyyah (d.1328), began to develop and actually based his famous *Al-Siyāsah al-Syar'īyyah fī Isblāḥ al-Rā'iy wal-Rā'iyah*¹ on Qur'an 4:58-59:

Surely Allah commands you to make over trusts to their owners and that when you judge between people you judge with justice, surely Allah admonishes you with what is excellent, surely Allah is Seeing, Hearing. O you who believe! Obey Allah and obey the Messenger and those in authority from among you, then if you quarrel about anything, refer it to Allah and the Messenger, if you believe in Allah and the last day; this is better and very good in the end.

This passage fully explains the concept of *siyāsah syarī'ah*, for the purposes of governance are to create a just society as well as to obey Allah Swt., the Messenger, and those Muslims placed in authority. This passage relates the fundamental dimensions of the policies devised and implemented by Islamic governments.

According to *Sūrah al-Nisā'*, verse 1, the first step in this regard is to turn over society's trust to those qualified people who deserve it.² Sayyid Quthub (ra) ass that this trust must be placed on those who can carry it and who are skilled in such matters.³ But this in itself is not enough, for judgments between and among people must also be just. These are *sine qua non* conditions. In addition, those who are responsible for fulfilling this trust must themselves obey the Qur'an and the Sunnah of the Messenger (pbuh), for that entitles them to the people's obedience. There is one exception, however: when those in power disobey the Creator.⁴ If the appropriate individuals do not accept this responsibility, then any quarrel must be referred to Allah Swt. and His Messenger (pbuh) for a ruling based on enjoining the good and forbidding the evil. As Allah Swt. ordains: "[H]elp one another in goodness and piety, and do not help one another in sin and aggression" (Qur'an 5:2). When those who can judge with justice accept this responsibility, *al-siyāsah al-'ādilah* (just policy) and *al-siyāsah al-shālihah* (good governance) are combined.⁵

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¹ Ibn Taymiyyah, *Al-Siyāsah al-Shar'īyyah fī Isblāḥ al-Rā'iy wal-Rā'iyah* (Riyadh: Dār al-'Ālam al-Fawā'id), p. 5; Ibn Taymiyyah, *Sharḥ Al-Siyāsah al-Shar'īyyah fī Isblāḥ al-Rā'iy wal-Rā'iyah li Shaikh al-Islām Ibn Taymiyyah*, by al-Shaikh Muḥammad bin Shāleḥ al-Uthaimayn, (Beirut: Dār-Uthmāniyyah and Dār Ibn Ḥazm, 2004), p. 17

² See Hamdi Yazir, *Tafsir Elmalili*.

³ See Sayyid Qutub, *Fī Zbilāl al-Qur'ān*,

⁴ Ḥadīth, narrated by Aḥmad, "There is no obedience to creation in disobedience to the Creator."

⁵ Ibn Taymiyyah, *Al-Siyāsah al-Shar'īyyah fī Isblāḥ al-Rā'iy wal-Rā'iyah*, p. 6; Ibn Taymiyyah, *Sharḥ Al-Siyāsah al-Shar'īyyah*, p. 18.

Scholars have used *siyâsah syarî'ah* for various purposes, for its multiple interpretations, for example, a *syarî'ah*-oriented policy, a *syarî'ah*-oriented public policy, and a government that rules in accord with the *syarî'ah*'s explicit guidance in all areas (e.g., legal, economic, fiscal, political, foreign affairs, constitutional, administrative, and public affairs), provided that the relevant rulings do not contradict the *syarî'ah*'s main principles.⁶

On the other hand, Ibn Qayyîm (d.1350) broadly considers this term to mean "any measure that actually brings the people closest to beneficence (*shalâh*) and furthest away from corruption (*fâsâd*) partakes in just *siyâsah* even if it has not been approved by the Prophet (pbuh) or regulated by divine revelation. Anyone who says that there is no *siyâsah syarî'ah* when the *syarî'ah* itself is silent is mistaken and has misunderstood the Companions (*Shahâbah*)."⁷ Despite its different understandings and interpretations, *siyâsah syarî'ah* is strongly connected with the *syarî'ah*'s spirit and objectives. In fact, it can only be considered if both of them are in harmony.

In addition, *siyâsah syarî'ah* can also be used to refer to the various *mashlahah* (public interest) that the Lawgiver has neither upheld nor overruled.⁸ It "implies decisions and policy measures taken by the imam and the *'ulu al-amr* (the leader of the ummah) on issues for which no specific ruling can be found in the *syarî'ah*." Similarly, it "denotes the administration of an Islamic polity's public affairs in such a way that the interests of the community are in harmony with the *syarî'ah*'s general principles, even if the policy in question disagrees with the rulings of particular *mujtahidûn*."⁹

Fuqahâ' like 'Abd al-Rahmân Tâj (d.1975), author of *Al-Siyâsah al-Syarî'ah wa al-Fiqh al-Islâmî*, have used *siyâsah syarî'ah* in the sense of implying flexibility (*tawshi'ah*) for rulers and judges in their decisions. In other words, it is used to indicate the authorities' discretionary powers on a specific issue, provided that the issued ruling does not contradict the *syarî'ah*'s principles.¹⁰

⁶ Muḥammad Hâsyim Kamali, *Siyâsah Sharî'ah or the Policies of Islamic Government*, *The American Journal of Islamic Social Sciences*, vol.6, no.1, 1998, p. 59-80 p. 61.

⁷ Ibn Qayyîm al-Jawzîyah, "*Al-THuruq al-Hukmiyah fi al-Siyâsah al-Sharî'ah*" (Cairo: al-Mu'assisah al-'Arabiyah li al-Thibâ'ah, 1380/1961), p. 16, qf. Muḥammad Hâsyim Kamali, *Siyâsah Sharî'ah or the Policies of Islamic Government*, p. 61.

⁸ 'Abd al-Wahhâb Khallâf, *Al-Siyâsah al-Syarî'ah* (Cairo: al-Maktabah al-Salafiyah, 1931), p. 3, qf. Muḥammad Hâsyim Kamali, *Siyâsah Sharî'ah or the Policies of Islamic Government*, p.61.

⁹ 'Abd al-Wahhâb Khallâf, p. 14 qf. Kamali, *Siyâsah Sharî'ah*, ibid. Muḥammad Hâsyim Kamali, *Siyâsah Sharî'ah or the Policies of Islamic Government*, p. 61.

¹⁰ 'Abd al-Rahmân Tâj, *Al-Siyâsah al-Sharî'ah wa al-Fiqh al-Islâmî* (Cairo: Mathba'ah Dâr al-Tâlîf, 1373/1953); 'Abd al-Wahhâ bKhallâf, *Al-Siyâsah al-Sharî'ah*, p. 3, Muḥammad Hâsyim Kamali, *Siyâsah*

Besides that, later jurists (*al-muta'akhhirûn*) used it to mean the administration of penalties meted out by rulers and judges to help them fight major sins and evils.¹¹ However, the scope of *siyâsah syarî'ah* cannot be limited to any particular part of the administration because it covers all areas of government.

Definition of *Siyâsah Syarî'ah*

Literally, *siyâsah* is derived from *sâsa-yasûsu* (سأسيسوس), which means "to take good care of something" or "comprehensive good governance." Technically, it is a political system that rules according to Islamic values to ensure the public interest through *ijtihad*. As it is up to the ruler or the jurists to determine whether the *ahkâm* (provisions) can be altered, before engaging in this practice they must make sure that no specific revelation on the proposed action exists..¹²

In contemporary terminology,¹³ *siyâsah al-syarî'ah* reflects good governance, effective governance, humane governance, participatory governance, better ruling, and the notion of governance. Islam deals with *'ibâdât*, *mu'âmalât*, and *siyâsah*—in short, with everything that is related to human beings.

In terms of public policy, a government or a governing system can be good or bad, effective or ineffective, depending upon the values underlying its governing practices. In this regard, the *syarî'ah* provides nine indicators: participation, the rule of law, transparency, responsiveness, consensus orientation, equality, effectiveness and efficiency, accountability, and strategic vision.¹⁴ Effective governance, therefore, refers to administration and constitutional law, governmental authority (e.g., the ruler), the *ahl al-hall wa al-'aqd* (viz., consultative members), the rights of the individual, public interest (*mashlahah 'ammah*), and others.¹⁵

Muḥammad Hâsyim Kamali briefly defines *siyâsah al-syarî'ah* as "a broad doctrine of Islamic law which

Sharî'ah or the Policies of Islamic Government, p. 62.

¹¹ 'Abd al-Wahhâb Khallâf, *Al-Siyâsah al-Sharî'ah*, p. 3.

¹² Irwan Mohd Subri et al, "Siyâsah Sharî'ah and Its Implementation in Malaysia," *Australian Journal of Basic and Applied Sciences*, 8(13) August 2014, p: 416-423, p. 419.

¹³ Sharifah Hayaati Syed Ismail al-Qudsy and Asmak Ab Rahman, "Effective Governance in the Era of Caliphate 'Umar Ibn Al-Khaththâb," *European Journal of Social Sciences*, volume 18, number 4 (2011), p. 612.

¹⁴ Sharifah Hayaati Syed Ismail al-Qudsy and Asmak Ab Rahman, "Effective Governance in the Era of Caliphate 'Umar Ibn Al-Khaththâb," p. 615.

¹⁵ FathiUthman, "*Ushûl al-Fikr al-Siyâsî al-Islâmî*," vol. 1 (Beirut: Mu'assasah al-Risâlah, 1979), qf. Sharifah Hayaati Syed Ismail al-Qudsy and Asmak Ab Rahman, "Effective Governance in the Era of Caliphate 'Umar Ibn Al-Khaththâb," p. 616.

authorizes the ruler to determine the manner in which the *syarī'ah* should be administered.¹⁶ In other words, the concept's fundamental basis is Islamic law, which allows the ruler to implement Allah's (swt) rules throughout society. This does not mean that the ruler cannot make his/her own governing decisions, but that whatever discretionary measures, policies, and rules he/she inaugurates for the sake of good government cannot violate the *syarī'ah*'s main principles.¹⁷ Briefly stated, it is a complete governing system that applies the goals and objectives of the *syarī'ah*.¹⁸ He emphasizes that "it's designed to serve the cause of justice and good government, especially when the rules of *syarī'ah* fall short of addressing a certain situation or development."¹⁹

Ibn Qayyīm, who elaborated upon the concept of *siyāsah al-syarī'ah* at the above,²⁰ distinguished the *syarī'ah*'s explicit basically permanent rules from the government's supplementary (ad hoc) decisions, in contrast to the Mālikī jurist Ibn Farḥūn (d.799/1396), who maintained that *siyāsah* is normative.²¹ Thus he did not restrict it to the welfare-based rule of an ad hoc nature, but maintained that *siyāsah* played an essential role in every field of substantive *syarī'ah* (e.g., *hudūd*, *ta'zīr*, and *qishāsh*) because it was part of the *syarī'ah*. As such, its normative nature is reflected from the Qur'ān and Sunnah.²² Although rulers and judges enjoy wide discretionary powers, and it encourages the *ulil amr* to be very meticulous and initiative in terms of taking all necessary measures in an attempt to ensure the best of government under the rule of law, it is unsuitable due to the authorities' possible use of it in an arbitrary and abusive manner and because it does not prohibit the possibility of regulating and controlling their discretionary power via statutory legislation.²³

¹⁶ Muḥammad Hāsyim Kamali, *Siyāsah Sharī'ah or the Policies of Islamic Government*, p. 59.

¹⁷ Muḥammad Hāsyim Kamali, *Siyāsah Sharī'ah or the Policies of Islamic Government*, p. 59.

¹⁸ Muḥammad Hāsyim Kamali, *Beyond the Sharī'ah: Siyāsah Sharī'ah and Its Application in Malaysia*, *Al-Shajarah, Journal of the International Institute of Islamic Thought and Civilization (ISTAC)*, vol:10, no.2, 2005, 169-192, p. 170.

¹⁹ Muḥammad Hāsyim Kamali, *Beyond the Sharī'ah: Siyāsah Sharī'ah and Its Application in Malaysia*, p. 169.

²⁰ Ibn Qayyīm al-Jawziyah, "*Al-THuruq al-Hukmiyah fi al-Siyāsah al-Sharī'ah*," p. 16, qf. Kamali, *Beyond the Sharī'ah: Siyāsah Sharī'ah and Its Application in Malaysia*, p. 170.

²¹ Kamali, *Beyond the Sharī'ah: Siyāsah Sharī'ah and Its Application in Malaysia*, p.171-172.

²² Burḥān al-Dīn Ibrāhīm b. 'Alī Ibn Farḥūn, "*Tabshīrāt al-Hukkām fi Ushūl al-Aqliyah wa Manābij*" (Cairo: al-Qāhirah al-Ḥadīthah lil-THibā'ah, 1406/1986,II), p. 138-139.

²³ Muḥammad Hāsyim Kamali, *Siyāsah Sharī'ah or the Policies of*

Historical Backdrop

Given that the concept of *siyāsah syarī'ah* seeks to secure the people's benefit and effective administration of their affairs, its seeds can be found right from Islam's first days. In fact, 'Umar ibn al-Khaththāb (d.644) preserved the *syarī'ah*'s spirit by applying the *siyāsah* in many of his policy decisions, such as in discontinuing the share of *mu'allafat al-qulūb*²⁴ in *zakāt* revenues and refusing to assign Iraq's fertile lands as war booty (*ghanimah*) to the warriors, although the Qur'ān clearly indicated the shares of both parties (Q. 9:60 and Q. 8:41, respectively). 'Alī ibn Abī Thālib's (d.661) based his ruling on a man's complaint regarding his father's death on his sensitive *siyāsah*,²⁵ namely, his *frāsah*, which is defined as the personal insight and intuitive judgement of the leader or jurists.²⁶

During the time of Basra's eminent jurist and judge 'Iyās bin Mu'āwiyah (d.740/122), *siyāsah al-syarī'ah* was used in adjudication and to determine the meaning of *istihsān*. If the present normative judgements were not enough to prevent evil, then jurists would use more beneficial ways in an attempt to bring about a better judgement and more effective ruling, "Use *qiyās* as a basis for judgment so far as it is beneficial to people, but when it leads to undesirable results then use juristic preference (*fastahsinū*)."²⁷ He also stated that "I understand that the judgments given in the courts should be in accordance with *istihsān*."²⁸

Under the later 'Abbāsids, 'Abd Allah Ibn al-Muqaffā' (d.137/756) interpreted *siyāsah syarī'ah* as discretion (*istiswāb*), having realized that the legal and administrative practices of the Umayyāds and early 'Abbāsids were inconsistent and frequently in conflict with the authentic Sunnah. He suggested that the caliph may codify and standardize existing usage and exercise his own discretion to introduce new regulations on

Islamic Government, p. 60.

²⁴ *Mu'allafat al-Qulūb*: People of influence whose support was important for the victory of Islam.

²⁵ Burḥān al-Dīn Ibrāhīm b. 'Alī Ibn Farḥūn, "*Tabshīrāt al-Hukkām fi Ushūl al-Aqliyah wa Manābij*," p.144-145.

²⁶ Muḥammad Hāsyim Kamali, *Beyond the Sharī'ah: Siyāsah Sharī'ah and Its Application in Malaysia*, p. 175.

²⁷ Saim Kayadibi, *Istihsān: The Doctrine of Juristic Preference in Islamic Law* (Kuala Lumpur: Islamic Book Trust, 2010), p. 127, see in 'Abd al-Rahmān Ibrāhīm Abū Sulaymān, "*Al-Fiqh al-Uṣūlī*" (Jaddah, Dār al-Shurūq, nd.), p. 152; Muwaffaq ibn Aḥmad Makkī (d.568/1172), "*Manāqib Abū Ḥanīfah*" (Beirut: np., 1981), vol. 1, p. 84; Abū Bakr Aḥmad b. 'Alī al-Rāzi Jashshāsh (d.370/981), "*Al-Fushūlfi al-Ushūl*," ed. 'Ajil Jasīm an-Nashmī (Kuwait: Wizārat al-Awqāf wa al-Shu'un al-Islāmiyyah, 1988), vol. 4, p. 229.

²⁸ Saim Kayadibi, *Istihsān: The Doctrine of Juristic Preference in Islamic La.*, p. 127, see Abū Bakr Aḥmad b. 'Alī al-Rāzi Jashshāsh (d.370/981), "*Al-Fushūlfi al-Ushūl*," p. 229.

political, administrative, military, and financial matters as long as they did not contradict the *shari'ah*'s main principles.²⁹ In addition, he observed that discretion must be taken into account in the absence of any established ruling or guidance from the Qur'an and Sunnah. In exceptional circumstances, the guardians of the *syari'ah* should be aware that *qiyas* can sometimes result in unfair and unjust rulings and that the use of discretion is sometimes necessary to ensure justice. He further ruled that unreserved adherence to *qiyas* sometimes leads to injustice and that flexibility was advisable in law in order to prevent an unjust ruling based on analogical deduction.³⁰

In line with good governance Nizhâm al-Mulk (d.1092), the well-known vizier to the Seljuq sultans Alp Arslan and Melik Shah as well as the founder of the Nizhâmiyyah schools, wrote his *Siyâsatnâma* (The Book of Government) to advise sultans on the many tricks they could employ while administering the state. On the other hand Ibn Taymiyyah wrote his renowned *Al-Siyâsah al-Syari'ah fi Ishlâh al-Ra'y wal-Ra'iyah*; Ibn Khaldun'a (d.1406) *Muqaddimah* mentioned two types of *siyâsah*, namely, *siyâsah 'aqliyyah* (rational policy) and *siyâsah dîniyyah* (religious policy);³¹ Ibn Qayyim al-Jawziyah (d.751/350) authored *Al-Thuruq al-Hukmiyyah fi al-Siyâsah al-Syari'ah*, which spoke of bringing beneficence (*shalâh*) and preventing corruption (*fasâd*)³²; Shihâb al-Dîn al-Qarafî (d.684/1285) used his *Kitâb Anwâr al-Burûq fi Anwâr al-Furûq* to join the concept of honour, the sixth *maqâshid al-syari'ah* value, to the concept.³³

Ibn Farhûn (d.799/1396) posited that *siyâsah* is normative and part of the *syari'ah*, which is based firmly on the Qur'an and Sunnah³⁴; 'Abd al-Wahhâb Khallâf discussed the practice of *mashlahah* in his *Al-Siyâsah al-Syari'ah*³⁵; Abul Hasan al-Mâwardî al-Shâfi'î (d.450/1058) wrote *Kitâb al-Ahkâm al-Sulthâniyyah*³⁶; and 'Abd al-

Ḥamîd Mutawallî authored *Mabâdî' Nizhâm al-Hukm fi al-Islâm* (Principles of Government in Islam).³⁷

Varieties

Ibn Qayyim divided *siyâsah syari'ah* into two types: (1) unjust *siyâsah* (i.e., *siyâsah zhâlimah*), defined as an undesirable act that the *syari'ah* prohibits, and (2) just *siyâsah siyâsah* (i.e., '*âdilah*'),³⁸ which is what the *shari'ah* seeks achieve: "[I]f you judge between people, judge with justice (Q. 4:58)." Ibn Taymiyyah bases his understanding of a just *siyâsah* as *amânah* (the fulfilment of trusts) on this verse³⁹: "Government as a whole is a trust in Islam, and government leaders and officials are under duty to hand over the trust to those who are entitled to it. Two specific themes that feature prominently in Ibn Taymiyyah's elaboration of *amânah* in this verse are the selection and appointment of government officials and the equitable distribution of wealth in the community."⁴⁰ According to the Qur'anic injunctions,⁴¹ the quality of a ruler's *amânah* is revealed in three attributes: not to be afraid of anyone, to fear only Allah Swt., and to not sell Allah's (swt) rulings for a small price (i.e., nothing has priority over such rulings).

One significant duty of the Islamic political system is to establish socioeconomic justice. Ibn Qayyim elaborates that Allah Swt. sent messengers and books to establish justice among humanity. So long as a sign indicates the path to justice, it is in harmony with the Law of Allah Swt., to achieve it. Ibn Qayyim stressed that "any path that leads to justice and fairness is an integral part of the religion and never contrary to it."⁴² Therefore, justice is achieved only when nothing contradicts the eternal Law of Allah Swt.: "We merely call it *siyâsah* because of the linguistic usage; however it is nothing other than the justice ordained by Allah Swt. and His Messenger (pbuh)."⁴³ If any such ordinance contradicts this Law, it must be rejected.

²⁹ Kamali, Beyond the Shari'ah: Siyâsah Shari'ah and Its Application in Malaysia, p. 177

³⁰ 'Abd Allah Ibn al-Muqaffâ' (d.137/756), "*Risâlah fi al-Shahâbah*," ed. Muḥammad Kurd 'Ali, 4th edition (Cairo: Risâlah Bulagh, 1954), p. 125-156, qf., Saim Kayadibi, *Istihâsân*, ibid., p. 127.

³¹ 'Abd al-Rahmân Ibn Khaldûn, "*Muqaddimah*" (Beirut: Dâr al-Kitâb al-Lubnânî, nd.), p. 337

³² Ibn Qayyim al-Jawziyah, "*Al-Thuruq al-Hukmiyyah fi al-Siyâsah al-Shari'ah*" (Cairo: al-Mu'assasah al-'Arabiyah li'l-Thibâ'ah, 1380/1961).

³³ Shihâb al-Dîn al-Qarafî al-Mâlîkî (d.684/1285), "*Kitâb Anwâr al-Burûq fi Anwâr al-Furûq*" (Beirut: Dâr al-Ma'rifah, nd.)

³⁴ Burhân al-Dîn Ibrahim b. 'Ali Ibn Farhûn, "*Tabshirât al-Hukkâm fi Ushûl al-'Aqliyyah wa Manâhij*," p. 138-139.

³⁵ 'Abd al-Wahhâb Khallâf, *Al-Siyâsah al-Shari'iyah* (Cairo: al-Maktabah al-Salafiyyah, 1931).

³⁶ Abu al-Hasan al-Mâwardî al-Shâfi'î (450/1058), "*Kitâb al-Ahkâm al-Sulthaniyyah*" (Cairo: Dâr al-Ḥadîth, 2006)

³⁷ Abd al-Ḥamîd Mutawallî, "*Mabâdî' Nizhâm al-Hukm fi al-Islâm*" (Alexandria: Mansha'ah al-Ma'ârif, 1974)

³⁸ Ibn Qayyim al-Jawziyah, "*Al-Thuruq al-Hukmiyyah fi al-Siyâsah al-Shari'ah*" (Riyâdh: Dâr al-'Alam al-Fawâid, 1424/2003), p. 7.

³⁹ Ibn Taymiyyah, "*Al-Siyâsah al-Shari'iyah fi Ishlâh al-Râ'iyah wal-Ra'iyah*," 2d ed. (Cairo: Dâr al-Kitâb al-'Arabî, 1951), p. 6-13, qf. Kamali, Beyond the Shari'ah: Siyâsah Shari'ah and Its Application in Malaysia, p. 171.

⁴⁰ Muhammad Hâsyim Kamali, Beyond the Shari'ah: Siyâsah Shari'ah and Its Application in Malaysia, p. 171; Muhammad Hâsyim Kamali, The Citizen and State in Islamic Law, *Syariah Law Journal*, no. 3 (Kuala Lumpur, April 1986), 15-47.

⁴¹ See the Qur'an 5:44

⁴² Ibn Qayyim al-Jawziyah, "*Al-Thuruq al-Hukmiyyah fi al-Siyâsah al-Shari'ah*" (Cairo: al-Mu'assasah al-'Arabiyah li'l-Thibâ'ah, 1380/1961), p. 16.

⁴³ Ibn Qayyim, al-Jawziyah, "*Al-Thuruq al-Hukmiyyah fi al-Siyâsah al-Shari'ah*" p. 5.

Objectives

The *shari'ah*'s ultimate objectives are to protect the six values: life, religion, intellect, lineage, property, and honour. Some contemporary scholars have added a seventh, "eliminating corruption," which enables rulers to use their discretionary powers to penalize evildoers. This is essential if the government seriously wants to achieve *falāh* (welfare) and prevent *fasād* (destruction) according to the legal maxim of *jalb al-mashālih wa dar' al-mafāsīd*.

As the Ultimate Creator, Allah Swt. sets standards for every creation and specific standards for governing (i.e., the *shari'ah*) that determine all other activities, whether they are *syarī'ah*-compliant or not,⁴⁴ as well as make sure that they not separated from such good values as *akhlāq* (good manners), defined in the Qur'ān as honesty and integrity (Q. 16:92), the administration of justice (Q. 4:58 and 42; Q. 6:153; Q. 42:15), loyalty (Q. 4:59), personal responsibility (Q. 6:164), and cooperation (Q. 5:2; Q. 76:24).⁴⁵ In order to achieve *siyāsah syarī'ah*, the following values should also be considered: faith (*īmān*) to hold sovereignty to Allah Swt. and His Messenger (pbuh), accountability and trust (*amānah*), moral values (*akhlāq*), consultation (*shūra*), and an office that prevents and forbids wrongdoing (*hisbah*).⁴⁶

The Maqāshid al-Syarī'ah (The Higher Objectives of Islamic Law)

The *maqāshid al-syarī'ah*, the foundation as well as the fundamental objectives of *siyāsah syarī'ah*, are reserved for the rulers and the jurists. Thus *siyāsah syarī'ah* must be in line with the *shari'ah*'s spirit and objectives. This can be seen in 'Umar's decision to terminate the charity assigned to the *mu'allafah al-qulūb*⁴⁷ (potential Muslims), despite its specific mention in the Qur'ān, in favour of its general purpose, "Allah Swt. has exalted Islam and it is no longer in need of their favour." Although it seems to violate the Qur'ān, it is nevertheless considered to be in harmony with its objectives.⁴⁸ In terms of priority, *mashlahah āmmah* (the public benefit) is superior to *mashlahah khāshshah*

(specific benefit). Therefore, the changed circumstances made the original ruling unnecessary because of the following general rule (maxim): "It is an accepted fact that the terms of law (*ahkām*) vary with the changes in the times."⁴⁹ All aspects of life are subject to constant transformation, and the law is no exception,⁵⁰ provided that the new rulings do not contravene the *shari'ah*'s objectives.

The Meaning of Maqāshid and the Maqāshid al-Syarī'ah

In the field, the terms *mashlahah* and *maqāshid* are used interchangeably. In terms of sources of Islamic law, *mashlahah* is considered a controversial source because it is based on benefit and avoiding hardship.⁵¹

Mashlahah is a proper basis for legislation in the absence of an explicit ruling within the Qur'ān and Sunnah, as well as within *ijmā'* and *qiyās*. If this is the case, then the *mujtahid* can resort to it to protect humanity's benefit and prevent corruption on Earth⁵² for, as Shāthibī (d.790/1388) indicated, "in the religious context the aim of obtaining the benefits (*jalb al-shalāh*) and avoiding evils (*daf' al-fasād*) are to provide the needs of this world for the sake of the hereafter and not providing personal desires or avoiding personal hatreds. Religion prevents people from following their desires and guides them to be a servant of Allah Swt..."⁵³

Shāthibī points out⁵⁴ that the *shari'ah*'s purpose is to promote the people's welfare and prevent corruption and hardship, as the Qur'ān clearly states, "We have not sent you but as a mercy for all creatures" (Q. 21:107) and "Allah never intends to impose hardship on people" (Q. 22:78) Allah Swt. also informs humanity that He "does not want to place you in difficulty, but He wants to purify you" (Q. 5:6).

Tunisian scholar Muḥammad al-Thāhir ibn Āsyūr (d.1973) defines *maqāshid al-syarī'ah* in the following terms, "The general objective[s] of Islamic Law are the meanings and wise purposes on the part of the Lawgiver which can be discerned in most or all of the situations to which the Law applies such that they

⁴⁴ See the rules and guidelines related to governance in Qur'an 4:58-59, 5:2, 21:105, 22:40-41, 24:55, and 57:25.

⁴⁵ Sharifah Hayaati Syed Ismail al-Qudsy and Asmak Ab Rahman, "Effective Governance in the Era of Caliphate 'Umar Ibn Al-Khaththāb," p. 618.

⁴⁶ Sharifah Hayaati Syed Ismail al-Qudsy and Asmak Ab Rahman, "Effective Governance in the Era of Caliphate 'Umar Ibn Al-Khaththāb," p. 619.

⁴⁷ This is defined as Muslims encouraging non-Muslims to accept Islam and show loyalty to it.

⁴⁸ 'Abd al-Rahmān Tāj, *Al-Siyāsah al-Sharī'iyah wa al-Fiqh al-Islāmī*, qf Kamali, *Siyāsah Sharī'ah or the Policies of Islamic Government*, p. 62.

⁴⁹ *Al-Majallah al-Ahkām*, clause: 39.

⁵⁰ Saim Kayadibi, "Ijtihad and a Modernist Perspective towards Islamic Law and Thought," *Journal of Islamic Law Studies (IHAD)*, 11, (2008), p. 116.

⁵¹ See, Saim Kayadibi, "Al-Tufi Centred Approach to *al-Mashlahah al-Mursalah*" (Public Interest) in Islamic Law, *Journal of Islamic Law Studies (IHAD)*, 9, (2007), 71-96.

⁵² Muhammad Hāsyim Kamali, "*Principles of Islamic Jurisprudence*" (Cambridge: Islamic Text Society, 1997), p. 268.

⁵³ Syāthibī, "*al-Muwāfaqāt*," v: 2, p. 29-30.

⁵⁴ Al-Syāthibī "*al-Muwāfaqāt*," v: 2, p. 3.

can be seen not to apply exclusively to a particular type of ruling. Included here are the occasions for the Law's establishment, its overall aim, and the meanings can be discerned throughout the Law. In order to perform *ijtihād*, a *mujtahid* must be able to understand the *syarī'ah*'s purposes. For example, Imām Mālik (d.179/795) regards *istihsān* as a purpose-centred method of interpretation, "*Istihsān* represents nine-tenths of human knowledge."⁵⁵

Ibn 'Āshūr opines that "Realizing *maqāshid al-syarī'ah* rescues people from narrow mindedness and literalism. The *maqāshid al-syarī'ah* leads to undiscovered horizons through eternal principles, and the essence and true meaning of Islam. To discover the true spirit of *maqāshid al-syarī'ah* is to distinguish the earthly from the divine, the temporary from the permanent, the alterable from the inalterable and the particular from the general.

In general, scholars have divided the *maqāshid al-syarī'ah* into three categories: *dharūriyyāt* (the essentials), *ḥājjiyyāt* (the complementaries), and *tahsīniyyāt* (the desirable or the embellishments). The social order is considered in three groups, however, in terms of the entire community, it is divided into *kullī* (whole) and *juz'ī* (partial). Nevertheless, in terms of the people's situations it consists of *qath'ī* (definite), *zhannī* (speculative), and *wahmī* (superstitious).⁵⁶

The *darūriyyāt* are six in number: religion, life, intellect, lineage, property, and honour. They are considered essential because any neglect of them would cause a total social disruption and anarchy. Ibn al-Hājib (d.646/1249), al-Qarāfī, al-Ghazālī, and Ibrāhīm al-Shāthibī (d.790/1388) considered these values, the last of which was added by al-Qarāfī, as protecting the honour of each Muslim which is attributed to al-Thūfī.⁵⁷ According to al-Ghazālī, destroying even one of them is *ḥarām*.⁵⁸ In general, the *sharī'ah* seeks to protect and promote these essentials in order to, for example, protect Islam. In that context, *jihād* for the sake of Allah Swt. has been confirmed as an obligatory act. To protect life, Allah Swt. prescribed *qishāsh* (retaliation); to protect the intellect, alcohol is forbidden; to preserve one's lineage, adultery is prohibited; to protect one's property, theft is prohibited. In fact, all threats to the social order are punishable offenses. Therefore, *jihād* protects their life, for without honour life would be incomplete and surely even be worse.

Shāthibī defines *ḥājjiyyāt* as that which is needed for *tawassī* (widening) and *raf'ul ḥaraj* (avoiding hardship). If they were ignored people would face harm and difficulty, but not as much as if the essentials were neglected.⁵⁹ In the context of *'ibādāt*, the concessions (*rukhash*) granted to the sick and travellers in terms of suspending the fast and shortening the prayers (*shalāt*) are designed to prevent hardship. This is the objective of all such concessions. In the area of criminal law, the prophetic *ḥadīth* of "suspend the prescribed penalties (*ḥudūd*) in all cases of doubt (ادرؤوا الحدود بالشبهات)" can be seen as providing a complementary *mashlahah*, because the burden of proof for crimes with prescribed penalties (*ḥudūd*) is very severe.⁶⁰ In the area of *mu'āmalāt*, the *sharī'ah*'s allowance of certain contracts (e.g., the sale of a *salām* contract [deferred delivery] and *ijārah* [lease and hire]) is not absolutely essential to maintain normal life. Thus they are classified as *ḥājjiyyāt* (complementary).

The third type, *tahsīniyyāt* or *kamāliyyāt* (embellishments), complete the first two types by representing the interests and awareness of the *mukallaf* (subject) in all areas and at all levels. Shāthibī indicated that they may be summarized as part of the moral constitution of *'ibādāt* (e.g., eliminating that which is dirty and considering all types of cleanness), customary matters (e.g., good conduct in eating and avoiding wastefulness in consumption), transactions (e.g., preventing others from selling that which is impure) and *jināyāt* (i.e., criminal offences, among them killing women, children, and religious people during *jihād*).⁶¹ Therefore *sadd al-dharā'ī'* is considered as a type of *tahsīniyyāt*. The *syarī'ah* encourages gentleness (*rifq*), good manners and conduct (*ḥusn al-khulq*), fair dealing (*ihsān*), as well as being a devoted person (*'ābid*) in terms of performing the supererogatory prayers, voluntary fasting, generosity to the poor and those in need in regard to all kind of customary matters, interpersonal relations, family matters, religious duties, and so on.

Kamali explores this notion by saying that "the *tahsīniyyāt* are a very important category, as they are all-pervasive and relate to all the other *mashāliḥ*. One can perform the obligatory *shalāt*, for example, in different ways. It may vary from performing it with full and proper concentration, giving each of its parts their due attention, to performing it with haste and thoughtlessness. Moreover, the Prophet (pbuh) said that "Allah is beautiful and He loves beauty"⁶² and "The best amongst you are

⁵⁵ Al-Shāthibī, "*Muwāfaqāt*," iv. 208.

⁵⁶ Muḥammad al-Thāhir ibn 'Āshūr, "*Maqāshid al-Sharī'ah al-Islāmiyyah*" (Tunis: 1946), p. 138.

⁵⁷ Muḥammad al-Thāhir ibn 'Āshūr, "*Maqāshid al-Sharī'ah al-Islāmiyyah*" p. 139.

⁵⁸ Ghazālī, "*al-Mushtashfā*," 1/288.

⁵⁹ Ghazālī, "*al-Mushtashfā*," 2/10-11.

⁶⁰ Muḥammad Hāsyim Kamali, "*Al-Maqashid al-Sharī'ah* (The Objectives of Islamic Law)," p. 2

⁶¹ Shāthibī "*al-Muwāfaqāt*," v: 2, p: 327.

⁶² Muslim, *Shahīḥ Muslim*, Book 1, *Ḥadīth* No. 164.

those who have the best manners and character.”⁶³ The *tahsiniyyât* cause our deeds to be accepted or rejected, for the Lawgiver is not in need of our deeds.

Regulators of the *Maqâshid al-Syari'ah*

The *maqâshid* must be attached to the Lawgiver's objectives. Ghazâlî remarked that “interpreting the *mashlahah* as protecting the *maqâshid al-syari'ah* [means that] nobody would oppose obeying the *mashlahah* unless they could produce positive evidence”⁶⁴ and “We occasionally consider *mashlahah* and rulings when indications interchangeably reflected one another.”⁶⁵

The following conditions were laid out in an attempt to ensure that the *maqâshid* could not be established arbitrarily based on what the authorities would like to see in terms of legislation. The *mashlahah* (1) must not conflict with a principle or value sustained by the *nashsh* (text) or *ijmâ'* (i.e., it cannot contradict a definitive indication or evidence⁶⁶); (2) must be genuine (*haqiqiyyah*) as opposed to inaccurate (*wahmiyyah*), which is an improper ground for legislation. For example, recording marriages in the courts and issuing marriage certificates, as well as recording contracts in the registry department, prevents *shahâdât al-zur* (false testimony) and stabilizes the *mu'âmalât*⁶⁷; and (3) must be *kullî* to secure its benefits and prevent harm as a whole, and not just to a particular person or a group of people.⁶⁸

Imâm Mâlik (d.179/795) added two more conditions: (1) The *mashlahah* must be *ma'qûlah* (rational) and adequate to the people of comprehend and (2) must prevent or eradicate hardship, as proclaimed in Qur'an 5:6: “God never intends to impose hardship upon people.”⁶⁹ Yet al-Ghazâlî maintained that *mashlahah* must be *dharûriyyât* in order to be valid.⁷⁰

Mashlahah or *maqâshid* are obtained by improving humanity's situation and removing evil, because humanity is Allah's (swt) vicegerent and holder of His truth. Therefore, a peaceful humanity would manage to create a peaceful world.⁷¹ In that sense, Shâthibî says

that “in the religious context the aim of obtaining the benefits (*jalb al-shalâh*) and avoiding evils (*daf' al-fasâd*) are to provide the needs of this world for the sake of the hereafter and not providing personal desires or avoiding personal hatreds. Religion prevents people from following their desires and guides them to be a servant of Allah.”⁷² Allah states this clearly: “And if the truth had been in accordance with their desires, verily, the heavens and the earth, and whosoever therein would have been corrupted” (Q. 23:71).⁷³

A Historical Approach to the *Maqâshid*

In terms of the *syari'ah* approach, when the *ushul al-fiqh* (principles of Islamic jurisprudence) were being formulated, the concept of *maqâshid al-shari'ah* was implicitly considered within its scope. But due to its nature, it was located within the philosophy of law and its objectives rather than the formulation of the principles of the text.⁷⁴ This might be because the *maqâshid* were already embedded within *ushul al-fiqh* and thus there was no need to consider them explicitly, for *ijtihad* was widely used to investigate the Lawgiver's purpose for the texts.

The *maqâshid* emerged with Hakîm al-Tirmidzî (d.255/869), the first person in the written literature to introduce it through the principle of *istiqrâ'* (induction). Although he may not have been a jurist (*faqîh*) or a scholar of the principles of jurisprudence (*ushûlî*), he was known as both a Sufi and a philosopher.⁷⁵ He was followed by Imâm Abû Manshûr al-Mâturîdî (d.333/944).⁷⁶ In addition, it should be noted that Juwaynî (d.478/1085) was the first one to actually attempt to evaluate the *maqâshid* and *mashlahah*.⁷⁷ He focused on the *maqâshid*, for “[w]hoever is unable to realize the purposes and wisdoms behind the orders and prohibitions of *Syari'* cannot be considered wise.”⁷⁸ He led their organization into five categories to make them easily understandable and was among the first jurists to refer to some of the five *dharûriyyât*.⁷⁹

Juwaynî's student al-Ghazâlî, another exemplary personality who expounded on the *maqâshid*, divided

⁶³ Shâhîh Bukhârî, Volume 4, Book 56, Number 759.

⁶⁴ Ghazâlî, *al-Mushtashfâ*, v: 1, p: 311.

⁶⁵ Ghazâlî, *Al-Mankhûl min Tâliqât Al-Ushûl*, 2d ed. (Damascus: Dâr Al-Fikr Al-'Arabi), p. 355.

⁶⁶ Aththâr, Hasan bin Muḥammad bin Maḥmûd (d.1250/1835), *‘Hâshiyah ‘alâ Sharḥ Jalâl al-Maḥallî ‘alâ Jam‘u al-Jawâmi‘* (Egypt: Mathba‘ah ‘Ilmiyyah, 1316 A.H.), part 2, p. 339.

⁶⁷ Wahbah al-Zuhaylî, *‘Ushûl*, part 2, p. 799.

⁶⁸ Khallâf *‘Ilm* p: 87; Badrân *‘Ushûl*, p. 214.

⁶⁹ Shâthibî, *al-‘Irisâm*, part 2, p. 307-314, Beirut.

⁷⁰ Ghazâlî, *al-Mushtashfâ*, part 1, p. 141.

⁷¹ Ibn Âshûr, Muḥammad Thâhir (d.1973), *Maqâsid al-Shari'ah al-Islâmiyyah* (İslam HukukFelsefesi, Gaye Problemi), tr. VecdiAkyüz and Mehmet Erdoğan (İstanbul: Rağbet, 1999),p. 121.

⁷² Shâthibî, *al-Muwâfaqât*, v: 2, p. 29-30.

⁷³ Qur'ân: al-Mu'minûn 23/71

⁷⁴ Muhammad Hâsyim Kamali, *Al-Maqâshid al-Shari'ah* (The Objectives of Islamic Law), p. 3

⁷⁵ Raysûnî, *‘Nazariyyât al-Maqâshid*, p. 26.

⁷⁶ Raysûnî, *‘Nazariyyât al-Maqâshid*, p. 29.

⁷⁷ For more about historical approach, see SaimKayadibi, An Approach to the Position of Islamic Law with the Consideration of the Reform through the Aiding Factors, *Journal of Islamic Law Studies(IHAD)*, 12, (2008), 155-182.

⁷⁸ Juwaynî, *‘Al-Talkhis*, v: 1, p. 206.

⁷⁹ Juwaynî, *‘Al-Burhân*, v: 2, p. 747.

rulings into the main categories of *mu'allal* (justifiable) and *ghayrimu'allal* (unjustifiable). He categorized his tutor's categorization into three main divisions, namely, *dharûriyyât*, *hâjiyyât*, and *tahsîniyyât*. He also brought the concept of *takmilât* into the field.⁸⁰

Other significant jurists who discussed *maqâshid al-syarî'ah* were Fakh al-Dîn al-Râzî (d.606/1209), Sayf al-Dîn al-Âmidî (d.631/1233), Ibn al-Hâjib, and 'Izz b. 'Abd al-Salâm (d.660/1262; a.k.a. "master of the scholars").⁸¹ Shihâb al-Dîn al-Qarafi, and Najm al-Dîn al-Tûfi (d.716/1316) are also very well-known names, as their opinions on *mashlahah* were outside the traditional frame.⁸² According to al-Tûfi, given that the Lawgiver's primary purpose is "obtaining *mashlahah* and removing evil," this principle must be applied to *âdât* (customs) and *mu'âmalât* even when the *nashsh* and *ijmâ'* contradict them.⁸³ Of course there is no objection when the latter two accommodate the *mashlahah*; but when they contradict them priority should be given to the *mashlahah* that can be applied by restricting (*takhsîsh*) the *nashsh* and *ijmâ'* or in the form of a declaration (*bayân*).

Later on, Ibn Taymiyyah, Ibn al-Qayyîm, and al-Shâhibî reassessed the concept of *maqâshid* by formulating a new and systemized method. Dihlawî (d.1176/1762) reassessed the *mashlahah* and reform via passionate arguments that "[w]hoever does not understand the purposes of *shar'î* rulings and whoever insists that these rulings do not include any *mashlahah* has not benefited from knowledge or wisdom. This person should shed tears for his own situation rather expect praise..."⁸⁴ Thâhir ibn 'Âshûr's *Maqâshid al-Syarî'ah al-Islâmiyyah* is a great contribution to this field,⁸⁵ as is Ahmad al-Raysûni's *Imam al-Shâhibî's Theory of the Higher Objectives and Intents of Islamic Law*.⁸⁶

Syâhibî made great efforts to ensure that the door was open for everyone to understand the wisdom and subtlety of Islamic law.⁸⁷ Muḥammad Fâdhil b. 'Âshûr comments on his *Muwâfaqât* by declaring "[w]ith this book, Shâhibî actually constructed a pyramid erected to the sky in terms of Islamic culture and he succeeded

in something that his ancestors simply did not bother to deal with, and he discovered evidences and methods which guaranteed the everlasting permanence and purity of the religion. Those who made an effort to uncover the subtlety of the religion became key personalities. The importance of Shâhibî's work has found more resonance during the re-awakening of the Islamic world from its long sleep, when religious rulings contradicted the requirements of contemporary life, especially in current and previous centuries. In this context, Shâhibî's *Muwâfaqât* is a real savior."⁸⁸ Thus he deserves to be called "the father" of the *maqâshid*.

The contemporary scholar 'Alall Fâsî emphasizes the importance of the *maqâshid al-syarî'ah* for *ijtihâd*, given his view that they are "an eternal source for the fields related to legislation and jurisdiction and it is not outside of the Islamic law; rather it is a source which is at the very heart of Islamic law. It is also not a complicated concept like the 'law of nature' which is not certifiable in terms of its purpose and borders... when it's necessary, the *maqâshid* may even be effective for a matter resolved by *nashsh*."

According to Ibn Rusyd, *shar'î* sources are a matter for juristic thought seen from the angle of Hanafî *istihsân* and Mâlikî *istishhâb*, which complement each other. It is important not to accept one and deny the other purely on sectarian grounds, for either one can be used to reach a solution as long as they do not contradict general principles. *Istihsân* considers *mashlahah* and justice when delivering a ruling, and jurists supposedly have a better awareness of the Lawgiver's purposes when a ruling's superficial meaning(s) is likely to induce injustice and is authorised and qualified to make such rulings more just, fair, and specific. However, this should never be done by an arbitrarily determined *mashlahah*. Even though the *syarî'ah* provides direct information regarding all rulings, when their superficial meanings are contradictory they must be interpreted according to the *nashsh*.⁸⁹

Ibn 'Âsyûr recommends using *ijtihâd* to resolve issues when the *nashsh* and *qiyâs* are silent, for "[j]urists' need of *maqâshid* is obvious for such situations, because they have the responsibility to maintain continuity of the rulings given by Islam for generations and eras after the Prophet (pubh)."⁹⁰ Moreover, scholars have established standards and principles to set the criteria

⁸⁰ Ghazâlî, "Al-Mustashfâ," v: 1, p. 286.

⁸¹ Masood, "Islamic Legal Philosophy," p. 157.

⁸² Koca, "Islam Hukukunda Mashlahat'ı Mursele,"

⁸³ Masood, "Islamic Legal Philosophy" p. 165.

⁸⁴ Dihlawî, "Hujjat Alâh al-Bâlighah," v: 1, p. 29.

⁸⁵ Ibn 'Âshûr, "Maqâshid al-Shariat al-Islâmiyyah" (Tunis: n.p., 1366 A.H.).

⁸⁶ See Ahmad al-Raysûni, "Imâm al-Shâhibî's Theory of the Higher Objectives and Intents of Islamic Law" (Selangor: Islamic Book Trust, 2006).

⁸⁷ Raysûni, "Nazhariyyât," p. 351.

⁸⁸ Muḥammad F. Ibn 'Âshûr, "Âlam al-Fiqr al-Islâmi' fî Târikh al-Maghrib al-'Arabî," p. 76 qf Raysûni, "Nazhariyyât" p. 352-353.

⁸⁹ Ibn Rushd, "Bidâyah al-Mujtahid," v: 1, p. 136, 137, v: 2, p. 154, 246.

⁹⁰ Ibn 'Âsyûr, "Maqâshid," p. 15-16.

for determining the Lawgiver's purposes, orders, and prohibitions.⁹¹ The concept of means (*wasâ'il*) related to the *maqâshid al-syari'ah* are the main instruments for achieving the *maqâshid*.⁹² Purposes and means must be assessed together, for the means depend on the ends: "Once the purpose is dismissed, then there is no means to pay attention,"⁹³ as *al-Majallah al-Ahkâm* proclaims, for "[i]f the principle fails, the accessory also fails."⁹⁴

The essence of the Shari'ah revealed to the prophets is always the same, because it was revealed from the same source. It has two aspects: the divine, which looks to revelation (*wahy*) and the Sunnah (tradition) and thus cannot be altered (however, their interpretation can change according to different situations and conditions) and the human, which represents the accumulated rulings given by jurists after interpreting the sources in accordance with reason and the needs of the age. The purpose of the Shari'ah is to maintain the social structure and secure the *mashlahah* in order to prevent evil.⁹⁵ Therefore, one of the prophets' main duties is to make an effort to establish and maintain justice, as Allah Swt. proclaims: "And Moses said to his brother Aaron, replace me among my people, act in the Right Way and follow not the way of the *mufsidûn* (mischief-makers)" (Q. 7:142 and 85; Q. 24:55).⁹⁶

Closing Remarks

In order to run a government smoothly, discretionary powers have to be used whenever flexibility is required. Therefore, their usage is accepted in principle in all areas of government. Although the rulers and judges have the power to change some regulations to a certain extent, they cannot change them beyond what the Shari'ah allows, because that divine source consists of eternally valid principles. Kamali justifies the use of discretionary power on the grounds that "had it not been for discretionary principles, such as *siyâsah*, *mashlahah*, and *ta'zîr*, the ruler would have been faced with an authority-oriented and all-encompassing system of law that was permanently fixed and inflexible."⁹⁷ He suggests that "given the increasing complexity of government in modern times, it would seem good *siyâsah* to define and restrict discretionary powers."⁹⁸ As

the concept of *maqâshid* is both the foundation and the fundamental objectives of *siyâsah syari'ah*, the essential values of the *maqâshid al-syari'ah* must be protected. Therefore, undertaking *jihâd* for the sake of Allah Swt. is an obligatory act for it protects the values of Muslims. It has to be emphasised here that protecting the value of honour, perhaps, has priority over all of the others since a humiliated Muslim's representation of being Allah's (Swt.) vicegerent renders this status questionable. []

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⁹¹ For this criterion and principles, see Bûthî, "*Dhawâbith*," p. 115-118; Ḥādîmî, "*Al-Ijtihâd*" p. 23-24; Ghazâlî, "*Al-Mustashfâ*," p. 179.

⁹² Ibn 'Abd al-Salâm "*Qawâ'id*," i. 104; Qarafi, "*Furûq*," ii. 23; Ibn 'Âshûr, "*Maqâshid*," 207.

⁹³ Qarafi, "*Furûq*," ii. 33.

⁹⁴ *Al-Majallah al-Ahkâm*: clause: 50.

⁹⁵ Ibn 'Âsyûr, "*Maqâshid*," p. 119.

⁹⁶ Qur'ân: 7/142; 7/85; 24/55.

⁹⁷ Ibn 'Âsyûr, "*Maqâshid*," p. 79.

⁹⁸ Ibn 'Âsyûr, "*Maqâshid*," p. 80.

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